

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

May 29, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2722

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF: CYNTHIA HOEKMAN,

PETITIONER-APPELLANT,

V.

MARVIN HOEKMAN,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Rock County:
JOHN W. ROETHE, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

ROGGENSACK, J. Cynthia Hoekman appeals an order awarding her maintenance of \$350 per month for three years. She claims that the trial court erred when it found that she could double her income in three years, without factual support for that finding in the record. She also contends that the court erroneously exercised its discretion by ignoring the fairness objective of

maintenance awards when it determined the level and duration of maintenance after this long-term marriage. Because we agree that the record lacked support for a finding of the trial court and because the trial court erroneously exercised its discretion, we reverse the maintenance award and remand with directions to reconsider the amount and duration of maintenance, using the proper legal standards discussed in this opinion.

BACKGROUND

At the date of their divorce, Marvin and Cynthia Hoekman had been married for twenty-five years. Marvin was then forty-four years old; Cynthia was forty-three. They had three children, one of whom was still a minor. The court awarded Cynthia physical placement of the youngest child, and ordered Marvin to pay seventeen percent of his gross income as child support. Neither the placement schedule nor the support award is contested on appeal.

As property division, the court awarded Marvin the family residence, two cars, a pontoon boat and some personal property, totaling \$198,385. It awarded Cynthia a car, some personal property and the family dogs, totaling \$4,780 in assets. The court also assigned \$156,370.27 of marital debt to Marvin and \$165.64 of marital debt to Cynthia. It ordered Marvin to pay Cynthia \$17,424, secured by a lien on the homestead, and subject to eight percent annual interest if not paid within a year, thereby making a net award to Marvin of \$24,772.73 and a net award to Cynthia of \$22,038.36. And finally it divided Marvin's 401(k) pension plan equally between the parties, by a qualified domestic relations order. The property division is uncontested.

The only area of contention on appeal is the maintenance award. At the time of the divorce Marvin was earning \$58,560 a year or \$4,880 a month

gross income.¹ Cynthia was working nineteen and one-half hours a week during the school year as a custodian at an elementary school, and earning an additional \$90 to \$120 dollars per week, cleaning three to four houses. Based on those two jobs, the court found Cynthia's income was \$10,500 a year, or \$875 a month. The court stated that the \$10,500 figure did not represent Cynthia's actual earning capacity, but it did not make a finding of what amount it determined she could earn based on her skills at the time of the divorce. The court found Cynthia's reasonable monthly budget was \$1,780. It made no factual findings as to Marvin's reasonable monthly budget, but noted that it had taken into account that he would have "a pretty good debt load" after the divorce.

Cynthia requested \$500 a month in maintenance, to be increased to seventeen percent of Marvin's gross income after their youngest child reaches her majority. Instead, the court calculated maintenance for Cynthia by starting out with what it determined to be her "needs" of \$1,780 per month, then subtracting the estimated \$830 which Cynthia would be receiving in child support and the \$600 in wages she would have after taxes, to arrive at a figure of \$350 a month for maintenance. It also limited the duration of maintenance to three years, finding that by that time Cynthia could nearly double her earnings to \$20,000 and "should be at a point where her earnings can cover her budgetary needs." However, the court left open the possibility that Cynthia could petition the court for a new hearing after three years to show that reasonable efforts to increase her earnings had failed. Cynthia challenges both the amount and the duration of the maintenance award on appeal.

¹ Marvin's job entails a good deal of travel and overtime pay, which varies from month to month.

DISCUSSION

Standard of Review.

The amount and duration of a maintenance award are within the discretion of the trial court. *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). However:

A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.... It is not enough that the relevant factors upon which discretion could have been based may be found obscurely in the record. If the exercise of discretion is to be upheld, it must be demonstrated on the record that those factors were considered in making the discretionary determination.

Id. at 66-67, 306 N.W.2d at 20-21.

Maintenance.

Section 767.26, STATS., lists a number of factors for a trial court to consider when determining the amount and duration of a maintenance award, including the length of the marriage, the age and health of the parties, the property division, the parties' respective educational levels and earning capacities, the contributions of one party to the education or earning power of the other, tax consequences, and the standard of living enjoyed during the marriage. These factors "are designed to further two distinct but related objectives in the award of maintenance: to support the recipient spouse in accordance with the needs and earning capacities of the parties (the support objective) and to ensure a fair and

equitable financial arrangement between the parties in each individual case (the fairness objective).” *LaRocque v. LaRocque*, 139 Wis.2d 23, 32-33, 406 N.W.2d 736, 740 (1987).

Thus, maintenance payments are not based solely on need or limited to situations where one spouse is not self-supporting. *Lundberg v. Lundberg*, 107 Wis.2d 1, 12-13, 318 N.W.2d 918, 923 (1982). Maintenance may also be used for compensation purposes, when one spouse has been socially or economically handicapped by his or her contribution to the marriage. *Id.* at 14-15, 318 N.W.2d at 924. In addition, although maintenance is conceptually distinct from property division, the two often must be considered together in order to achieve a fair and equitable result. *Bahr v. Bahr*, 107 Wis.2d 72, 79-80, 318 N.W.2d 391, 395-96 (1982). A trial court erroneously exercises its discretion when it “constru[es] the support objective too narrowly and disregard[s] the fairness objective.” *LaRocque*, 139 Wis.2d at 33-34, 406 N.W.2d at 740.

1. *Amount of Maintenance.*

The starting point for a maintenance evaluation following a long-term marriage is to award the dependent spouse half of the total combined earnings of both parties. *Bahr* at 85, 318 N.W.2d at 398. This amount may then “be adjusted following reasoned consideration of the statutorily enumerated maintenance factors.” *Id.* However, even if “[t]he increased expenses of separate households may prevent the parties from continuing at their pre-divorce standard of living, [a] court must not reduce the recipient spouse to subsistence level while the payor spouse preserves the pre-divorce standard of living.” *LaRocque*, 139 Wis.2d at 35, 406 N.W.2d at 741. Furthermore, where one party developed a stream of income as the principal wage-earner during a marriage, while the other

contributed to the marriage as a homemaker, the court cannot rely solely on the property division to compensate the homemaker for his or her loss of income following the divorce. *Id.* at 38, 406 N.W.2d at 742.

Although we benefited from the trial court's reasoning in many areas of its decision, it applied the wrong legal standard for calculating maintenance when it focused solely on Cynthia's budgetary needs and earnings, and neglected to address the significant disparity in the parties' income following a long-term marriage. In other words, it considered the support objective, but not the fairness objective of a maintenance award. Following the directive in *Bahr*, the starting point for maintenance should have been to equalize the disparity in Marvin and Cynthia's incomes by taking half of their combined income (that is, \$58,560 plus \$10,500) to get an average of \$34,530 a year, or \$2,877.50 a month. Using only her own earnings, Cynthia would be \$2,002.50 a month short of that average.

The \$2,002.50 per month potential payment under the fairness objective can be adjusted, after consideration of the proper statutory factors, including the relevant needs of the parties, and the fact that Marvin is already paying \$830 a month in child support.² However, merely noting that Marvin would be carrying a large amount of debt after the property division does not in and of itself justify such a large disparity in monthly income. Furthermore, he was awarded more of the marital property to compensate for the additional debt he received.

² However, we also note in this regard that Cynthia is already presumed to be spending 17% of her income on the minor child who is living with her. *Cook v. Cook*, 208 Wis.2d 166, 184 ___ N.W.2d ___ (1997). Therefore, the court should guard against deducting Marvin's child support payments from his available income while including the amount Cynthia must spend on their child in the calculation of her available income.

There must be some analysis of whether Marvin's debt load is reasonable. For instance, Marvin testified that he pays \$1,289.19 a month for the mortgage on the house, and that an adult woman and her two children live there with him rent free. We are left with the question of whether it is equitable for Marvin to spend that much on housing while Cynthia and their daughter are limited to \$500 monthly rent. Just because Marvin chooses to keep the house, it does not follow that it is fair for him to enjoy a standard of living substantially similar to that which the parties shared during the marriage, while Cynthia has restricted her basic monthly budget and standard of living. On remand, the trial court must take into consideration the *relative* and *reasonable* financial needs of the parties.

2. *Term of Maintenance.*

Limiting the term of a maintenance award may serve several functions, such as allowing the recipient to pursue training or further education, encouraging the recipient to seek employment, and minimizing future contact between the parties. *LaRocque*, 139 Wis.2d at 41, 406 N.W.2d at 743. The statutory guidelines instruct the trial court to consider “[t]he feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.” Section 767.26(6), STATS. However, requiring the trial court to consider the feasibility of the recipient becoming self-supporting “does not stand for the proposition that a spouse cannot qualify for maintenance payments over an extended or indefinite period.” *Hartung*, 102 Wis.2d at 64, 306 N.W.2d at 19.

Because limited-term maintenance is relatively inflexible and final, the circuit court must take particular care to be

realistic about the recipient spouse's future earning capacity. The circuit court must not prematurely relieve a payor spouse of a support obligation lest a needy former spouse become the obligation of the taxpayers.

LaRocque, 139 Wis.2d at 41, 406 N.W.2d at 743. At a minimum, the record must reflect the recipient's skills, the jobs available in that field, the likelihood that the recipient would be hired, and how long it would take to reach the target salary. *Id.* at 42, 406 N.W.2d at 743.

Cynthia was forty-three years old at the time of the divorce. She married Marvin the year after she graduated from high school, and had no further education. She never earned more than \$4,000 a year during the marriage, in part because Marvin wanted her to be available for the children and to have dinner ready every evening when he returned from work. She testified that she had no secretarial skills, or training beyond the custodial work and housecleaning that she was already performing. She explained that the school district only hires part-time custodians to work after school lets out each day, and that it has no budget for full time positions. There was no evidence presented as to how many hours she spends cleaning three to four houses each week, or whether or where she may be able to find more clients. Nonetheless, the trial court found that she could be making \$20,000 a year within three years.³

As previously noted, the trial court focused solely on Cynthia's ability to support herself, rather than on the relative positions of the parties. Even assuming that Cynthia could earn \$20,000 a year, there would still be approximately a \$40,000 gap between her income and Marvin's. The disparity in

³ Cynthia claims that this finding was clearly erroneous. And we agree. There are insufficient facts in the record to support this finding.

the parties' earning capacities was created over the course of a twenty-five year marriage, while Marvin benefited from Cynthia's relative absence from the job market. Fairness demands that Cynthia be compensated for her contributions to Marvin's increased earning power and the loss of time from the job market during which she may have developed her own earning potential. This is precisely the type of marriage which calls for strong consideration of an indefinite term of maintenance.

Furthermore, the court's order terminates Cynthia's maintenance at the same time child support payments will end. Cynthia suggests that the coterminous nature of maintenance with her child's minority in effect turns the maintenance award into nothing more than augmented child support. Cynthia's claim to maintenance does not rest on the fact that she has physical placement of the parties' child. We also note that the trial court apparently failed to consider the fact that it was terminating maintenance at the very time when Cynthia's need for support and Marvin's ability to pay would both increase. We conclude that the trial court erroneously exercised its discretion when it limited Cynthia's maintenance to a term of three years.

CONCLUSION

The trial court's award of limited term maintenance must be set aside due to the lack of proper consideration of the fairness objective of Wisconsin's maintenance statute and because there is not adequate support in the record for the trial court's finding that Cynthia would be self-supporting after three years. On remand, the trial court must make findings as to Marvin's reasonable monthly needs and ability to pay, both before and after he completes his child support obligation. Based on those findings, the starting point for maintenance

articulated in *Bahr*, and the fairness objective of maintenance after a long-term marriage, it should set maintenance for Cynthia.

By the court.—Judgment reversed and cause remanded with directions.

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